88-2077

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

JOHN EDWARD HARRIS,
PATRICIA FAY MURPHY,
CHARLES DALE REED,

Petitioners,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Tex. Penal Code*, § 30.05, proscribing criminal trespass, is unconstitutional as applied to halt the peaceful distribution of pro-life literature and associated speech to students (and others) at a public high school where the critical portion of such activities took place on outside school property in or adjacent to a vehicle unloading area prior to the commencement of the main classes for the day;

2. Whether, under the free speech and press provisions of the 1st Amendment to the U.S. Constitution, Petitioners had the right peacefully to offer and distribute literature and speak in connection therewith to students at a public high school where the critical portion of such activities took place on outside school property in or adjacent to a vehicle unloading area prior to the commencement of the main classes for the day; and

3. Whether the affected outside public school property at the date and time involved constituted a limited public forum.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1-2

STATEMENT OF THE CASE 2

A. The Setting 2

B. Pertinent Activities 3

C. Federal Questions 9

ARGUMENT 10

I. THE LITERATURE DISTRIBUTION AND ASSOCIATED SPEECH WERE PROTECTED BY THE FREE PRESS AND SPEECH PROVISIONS OF THE 1ST AMENDMENT TO THE U.S. CONSTITUTION 10

II. THE SCHOOL PROPERTY AT THE DATE AND TIME INVOLVED CONSTITUTED A LIMITED PUBLIC FORUM 12

CONCLUSION 13

APPENDIX ..... App. 1-43

TABLE OF AUTHORITIES

Page

I. CASES:

Cornelius v. NAACP Legal Defense and Education Fund, Inc., 105 S. Ct. 3439 (1985)..... 12

Dallas Association of Community Organizations for Reform Now v. Dallas County Hosp. Dist., 670 F. 2d 629 (C.A. 5, 1982), *cert. denied*, 103 S. Ct. 471.....11, 13

Martin v. Struthers, 319 U.S. 741 (1943).....12

New York Times v. Sullivan, 376 U.S. 254 (1964)..12

Tinker v. Des Moines I.C.S. Dist., 393 U.S. 503 (1969).....12

II. U.S. CONSTITUTION:

1st Amendment..... 1, 10, 11

14th Amendment.....1-2, 11

III. TEXAS STATUTORY LAW:

Tex. Education Code, § 4.30..... 9, 11

Tex. Penal Code, § 30.05.....9, 10, 11

OPINIONS BELOW

The Court of Appeals wrote three opinions, one for each Petitioner. The Opinions applicable to Petitioners Harris (Pet. App. 1-11) and Murphy (Pet. App. 12-22) are not reported. The Opinion applicable to Petitioner Reed (Pet. App. 23-33) is reported at 762 S.W. 2d 440.

JURISDICTION

The Judgments of the Court of Appeals applicable to all Petitioners was rendered on November 8, 1988 (Pet. App. 34-36). The Court of Appeals overruled Petitioners' timely Motions for Rehearing on November 29, 1988. The Court of Criminal Appeals refused the timely filed Petition for Discretionary Review of each Petitioner on March 22, 1989 (Pet. App. 40-41) and, on April 19, 1989, denied the timely filed Motion for Rehearing of each Petitioner (Pet. App. 42-43). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION:

First Amendment:

> Congress shall make no law *** abridging the freedom of speech, or of the press ***.

Fourteenth Amendment:

> *** [N]or shall any State deprive any per-

son of life, liberty, or property, without due process of law ***.

STATEMENT OF THE CASE

Following a jury trial on November 3-4, 1987, Petitioners were found guilty of criminal trespass occurring on January 22, 1987, of the property of one Wilson Elliott. The property involved was that of the Friendswood High School located in Galveston County, State of Texas ("School"). The School is owned and operated by the Friendswood Independent School District, a governmental subdivision of the State of Texas organized for public school purposes. Without objection from the State, Petitioners withdrew their elections to have the Jury assess punishment and agreed to sentencing by the Trial Court. Following a hearing, the Trial Court (Hon. John Thoma) sentenced each Petitioner to pay a fine of $50.00 which, in turn, was probated for a period of 90 days, to pay all court costs and to perform 40 hours of community service as a condition of probation (S.F. 419-420).

On appeal, the Court of Appeals affirmed the Judgments of Conviction as to each Petitioner and overruled subsequently their motions for rehearing. The Court of Criminal Appeals refused the Petition for Discretionary Review of each Petitioner and denied subsequently their motions for rehearing.

The pertinent facts are these:

A. *The Setting*. The School is owned by the Friendswood Independent School District, which is a

governmental unit of Texas for a certain purpose. It is supported by the taxpaying public of the District (S.F. 37-38).

On January 22, 1987, the School had a student enrollment of 1100 or 1150 (S.F. 59, 149). About 90 students were attending early morning classes that day. These classes began at 7:30 a.m. The main classes began at 8:30 a.m., with first bell at 8:25 a.m. (S.F. 36, 136, 149).

Greenbrier Drive is a public road which runs along the front area of the School. A drainage ditch runs parallel to Greenbrier in that area. A paved area used by school buses extends between a grass area beyond the ditch and the area of a parallel sidewalk entrance way to the main school building. Vehicles may turn off Greenbrier into such bus area or into other paved areas.

There were no signs or barriers restricting entry onto the campus of the school, nor were there any signs restricting students from conversing (S.F. 205, 261-262, 300-301). Most of the students arrived at school by vehicle (S.F. 147-148, 168). Some students talked or conversed while outside the school (S.F. 205, 262, 301). There was no access to students from Greenbrier Drive because there was no sidewalk along the road, no one stops there and there was nothing but a drainage ditch (nearby) (S.F. 204-205, 261; see S.F. 148).

B. *Pertinent Activities*. On January 22, 1987, Petitioners, Mrs. Lisa Kelly and another person drove to the School in order to distribute pro-life literature.[1] This was

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[1] The Information as to Mrs. Kelly was dismissed (with prejudice) during the trial. The fifth person, who remained in a car, was not arrested or charged.

part of a larger pro-life literature distribution activity sponsored that day by Right To Life Advocates, Inc. and Foundation for Life for schools in the Greater Houston Area. They arrived about 7:45 a.m. Petitioner Harris, who was the group leader, did not seek nor have permission from school authorities to distribute literature there. He said that the 1st Amendment was license and he did not want to waive that (S.F. 223). Murphy felt that they had the legal right to be there and to distribute literature on the outside (S.F. 274), but that they might get arrested if they did not follow the Guidelines (concerning the distribution of literature at public schools prepared by Petitioners' Attorney herein) (S.F. 271). Reed believed that if he followed the Guidelines he would not be arrested and charged (S.F. 310).

Petitioner Reed and Mrs. Kelly went to a side entrance area of the school and offered and distributed some literature to students. Petitioners Harris and Murphy went to the front area of the School. Complainant Wilson Elliott, who was the Early Morning Administrator of the School, approached Harris and asked whether he had permission to be on campus to distribute literature (S.F. 19). When Harris did not answer, Elliott said that if he did not have permission "he would have to leave our campus because we do not allow anyone to pass out literature on our campus" (S.F. 19; see S.F. 333). Harris showed Elliott a copy of the Guidelines. Elliott read the Guidelines and went back into the School. After certain telephone conversations, Elliott went back outside and told Harris that he had been informed that that was "private property", and that he would need to leave (S.F. 21-22, 208). Harris did not leave. Elliott said that if he did

not leave at that time he would call the police for a unit, and he did just that.

Shortly thereafter, City of Friendswood Police Officer Scott Wilson arrived on the scene and spoke with Harris. He explained criminal trespass. Harris handed him a copy of the Guidelines and said "that he had a right to be there" (S.F. 67). Officer Wilson read the Guidelines and said that that "was his lawyer's opinion and not a judge's opinion, and that it was not valid" (S.F. 67; see S.F. 209, 278). Officer Wilson explained again criminal trespass, and he and Elliott asked Harris to leave (S.F. 67). Officer Wilson called for another unit and, at Harris' request, called for a supervisory officer per the Guidelines (S.F. 67, 71, 81, 90, 209, 278).

Subsequently, Friendswood Police Officer Ramona Satsky arrived. She requested Reed and Kelly to come with her to the front of the school, and they complied. According to Officer Wilson, he explained to the four Defendants (Petitioners and Mrs. Kelly) as a group that they were trespassing and requested them to leave; however, while he was talking, the Defendants continued to hand out literature even though he advised them not to do so until they got the situation settled (S.F. 69-70; see S.F. 102-103). According to Elliott, he asked the Defendants in a group setting to leave (S.F. 25, 40-41).[2]

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[2] However, Murphy and Reed testified that they were not requested to leave by Officer Wilson or Elliott (S.F. 262-263, 312-313, 322-324); Murphy said that the group was not brought together by the police for a talk (S.F. 267-268); Reed said that he had never seen Elliott until the day before he testified (S.F. 306). Harris did not believe that Elliott talked to them as a group (S.F. 208); and Kelly testified that she did not hear Elliott ask the group as a whole to leave (S.F. 341-342).

In the meantime, school busses with students were arriving in the front area of the school. Petitioners and Mrs. Kelly proceeded to offer or distribute literature to the students who were getting off the buses despite requests from the police not to do so (S.F. 70-71, 73-74, 103-104, 108-110, 112-113, 200-202, 237-240, 258-259, 304-305). According to the Officers, the Defendants were standing in the doorways of the busses to distribute literature (S.F. 71, 72, 73, 103, 110). This was denied by the Defendants (S.F. 201-202, 239, 252, 258, 305-306). Instead, Kelly and Reed were at the side of the buses near the doorways; Harris was on the sidewalk which ran parallel to the street "[s]o that we could offer it to them as soon as they stepped off the bus" (S.F. 202); Murphy was on the sidewalk near where the bus(es) would pull up and not blocking the entrances to the school; Officers Satsky and Wilson placed themselves between Defendants (or some of them) and students leaving the buses; Harris offered literature over the shoulder of Officer Wilson and Reed said that they offered it around the officers (S.F. 200-202, 237-239, 252, 258-259, 304-306, 316). Officer Wilson said that the situation was kind of chaotic; that he "and the other officers" were trying to remove Defendants from the bus doorway, "trying to back them away"; and that they were offering literature over his back (S.F. 70, 74).

Defendants' activities were peaceful and orderly (S.F. 46-47, 114, 203-204, 233, 260). They did not (a) block entrances, (b) prevent students from going to classes, (c) entice students from classes, (d) enter any building, (e) force literature on anyone, (f) use bullhorns, (g) make loud noises, (h) argue with anyone or (i) create any litter

(S.F. 200-202, 232-233, 239, 259-260, 297-299, 317). They offered and distributed literature, and some students took it and some did not (S.F. 203, 232, 237-238, 259, 297-298, 305, 308, 316).

In the meantime, the matter was on hold while awaiting the supervisory officer (S.F. 278-279). Harris considered that he had an understanding with Officer Wilson that they would await the supervisory officer for a determination (S.F. 286-287). Officer Wilson did not arrest and instead deferred to his supervisor (S.F. 82). No threat of arrest had been made prior to the arrival of the supervisory officer (S.F. 279-280, 286).

Subsequently, Sgt. Gary Edwards, a supervisory officer of the City of Friendswood Police, arrived on the scene. Harris proceeded to walk over to him but Officer Wilson told him to wait there (S.F. 210, 212). Officer Wilson denied that he said that (S.F. 89), but said that Harris was not given a chance to talk to Sgt. Edwards (S.F. 82). He said that, in such circumstances, he would allow them to talk to a supervisory officer, but that when the supervisor got there he did not want to talk to them (S.F. 89). While Officer Wilson spoke with Sgt. Edwards, Harris did not (S.F. 82-83, 210, 212, 213). Harris was acting under the Guidelines and intended to talk to the supervisor, to show the Guidelines and, if threatened with arrest, to leave under protest (S.F. 211, 279). Officer Wilson said that the guideline concerning the supervisory officer "says for me to call him. I did so. It does not say anything about talking to him" (S.F. 90).

In the meantime, Principal Curtis Wilson came out of the building and asked Harris to "please remove" himself

and his group from the campus (S.F. 133) and, after Harris said that he had a right to be there (S.F. 134), he, Wilson, requested the police to "please remove" them from the campus (S.F. 151, 152-153). He admitted he was upset at the situation (S.F. 151).[3]

Subsequently, Officer Wilson returned from his meeting with Sgt. Edwards and announced that the Defendants were under arrest (S.F. 78, 212). Harris was surprised when arrested (S.F. 282). According to Officer Wilson, Sgt. Edwards said that if the principal wanted them arrested to go ahead and arrest them (S.F. 83). Defendants were taken to the side area of the school where, in plain view of many students, they were searched and handcuffed behind their backs (S.F. 78, 80, 115, 212-213, 242, 265, 315). They were taken to the police station in Friendswood. Later, they were taken to the Galveston County Jail (and released later that day).

Elliott and Wilson testified that they do not allow people to distribute literature there (S.F. 138, 154, 343). Literature may be made available to students where approved in advance by the school superintendent or his designee (S.F. 159-160; see S.F. 343). Elliott said that he would have made the literature available to students had Defendants come to him first (S.F. 343). He was aware of

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[3] Kelly and Murphy testified that Wilson came out of the building, that he appeared angry or agitated, and that he yelled, "Arrest them. Arrest them all" or "Arrest them. Arrest them now. Don't wait" (S.F. 240-241, 264). According to Harris, Wilson came out the door "furiously angry", yelled at them to leave and when he, Harris, stood there, said, "Arrest them, arrest them all" (S.F. 211-212).

Section 4.30(f) of the *Texas Education Code* when he ordered Harris off the campus (S.F. 50-51). Wilson testified that the day was abnormal and not conducive to learning, but admitted that the disruption was caused partly by the arrests there (which were in plain view of many students) (S.F. 137-138, 154). Reed testified that there would have been no disruption if the police were not called, and that the police caused the disruption.

C. *Federal Questions.* Before trial, each Petitioner and Kelly filed a motion to quash information no. 1 and a motion to quash information no. 2 on the grounds that their activities were protected by, *inter alia,* the 1st Amendment to the U.S. Constitution (motions to quash no. 1), and that *Tex. Penal Code,* § 30.05, proscribing criminal trespass, was unconstitutional as applied to their conduct on the date and place in question (motions to quash no. 2). The Trial Court denied these motions.

Substantial evidence was introduced or developed of Petitioners' and Kelly's free press and speech activities, including the introduction into evidence of copies of the Guidelines, *Tex. Education Code,* § 4.30 and Friendswood ISD Policy, "COMMUNITY USE OF SCHOOL FACILITIES: CONDUCT ON SCHOOL PREMISES", which included provisions concerning disruption of classes, free speech, trespassing, etc. Petitioners submitted two special instructions to the Trial Court for inclusion in its instructions to the Jury, including one on the defense of free speech and press under the U.S. Constitution. These requests were denied also.

Finally, after return of the guilty verdicts, Petitioners moved that the Trial Court arrest judgment on certain

grounds, including the Trial Court's denial of motion to quash nos. 1 and 2 and denial of said special instruction. This motion was denied.

On appeal, Petitioners contended, *inter alia*, that their activities were protected under the 1st Amendment, that *Tex. Penal Code*, § 30.05 was unconstitutional as applied to their conduct, and that the Trial Court erred in denying the affected motions to quash. Petitioners contended also that, *inter alia*, the property at issue constituted a limited public forum. The Court of Appeals ruled against Petitioners on these points and overruled subsequently their motions for rehearing which raised them again.

In their Petitions for Discretionary Review, Petitioners raised, *inter alia*, the same grounds for review. The Court of Criminal Appeals refused such Petitions and denied subsequently their motions for rehearing which raised the same (and other) grounds.

ARGUMENT

I.

THE LITERATURE DISTRIBUTION ACTIVITIES AND ASSOCIATED SPEECH WERE PROTECTED BY THE FREE PRESS AND SPEECH PROVISIONS OF THE 1ST AMENDMENT TO THE U.S. CONSTITUTION

The Court of Appeals ruled that "[t]he enforcement of the criminal trespass statute in this instance did not violate" Petitioners' rights of expression under the U.S. Constitution (Pet. App. 6, 17, 28). The Court, however, failed to appraise the situation in light of all of the relevant factors.

In this regard, the Petitioners and Mrs. Kelly sought access to and utilized peacefully certain outside school properties for free expression purposes *prior* to the time that the main classes were to begin for the day. Hence, the activities did not interfere as such with the School's educational mission. The properties were open in the sense of no barriers, etc., the activities were peaceful, etc. See Statement of the Case, *supra*. See also, *Tex. Education Code*, § 4.30.

The outside properties and time involved should be considered a limited public forum for free expression purposes. See *Dallas Association of Community Organizations for Reform Now v. Dallas County Hosp. Dist.*, 670 F. 2d 629 (C.A. 5, 1982), *cert. denied*, 103 S. Ct. 471 (Justice Blackmun would grant certiorari and give the case plenary consideration while Justice Rehnquist filed a dissenting opinion). This was fortified by the fact that Petitioners and Mrs. Kelly did not have reasonable access from Greenbrier Drive, a public road. Accordingly, the literature distribution and speech activities at issue were protected under the free press and speech provisions of the 1st Amendment to the U.S. Constitution, as enjoined on the States under the Due Process Clause of the 14th Amendment thereof, and *Tex. Penal Code*, § 30.05, was unconstitutional as applied to the same.

While the exercise of such rights is subject to reasonable time, place and manner regulation, it may not be prohibited in such forum. The governing body of such School must accommodate national public policy while seeing to it that the properties are used for their intended purposes. See *id.* at 632-633. Reasonable balancing and accommodation are required. This should take into

account relevant factors, including that the property is publicly owned and operated for school purposes, and that students have free expression rights under the 1st Amendment to the U.S. Constitution [*Tinker v. Des Moines I.C.S. Dist.*, 393 U.S. 503 (1969).[4] The offering and receipt of information and ideas are compatible with a learning environment.

II.

THE SCHOOL PROPERTY AT THE DATE AND TIME INVOLVED CONSTITUTED A LIMITED PUBLIC FORUM

The Court of Appeals concluded that the record established indisputably that the activities of each Petitioner "were conducted in a nonpublic forum", and that the "area involved in this case" was clearly not a "public forum, either traditional or limited" (Pet. App. 5, 16, 26, 27). However, "*** [f]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker." *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 105 S. Ct. 3439, 3449 (1985).

As shown above, Petitioners and Mrs. Kelly sought access only to certain outside school properties for free expression purposes, and only before the beginning of

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[4] Free speech and press rights include necessarily the right to receive information. See *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). The free expression rights of students would be hollow if, as here, they could be denied the right to receive information which others were willing to offer and disseminate to them.

the main classes for the day. The vehicle unloading area and adjacent grounds in front of the School constitute the critical property. This property at the time involved should be considered a limited public forum for such purposes. See *Dallas Association of Community Organizations for reform Now v. Dallas County Hosp. Dist., supra,* 670 F. 2d at 630-631.

CONCLUSION

For the reasons and authorities set forth herein, it is submitted respectfully that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June, 1989

APPENDIX

OPINION OF THE COURT OF APPEALS
(Harris v. Texas)
(November 8, 1988)

Court of Appeals
Sixth District
Texarkana, Texas

John Edward Harris...Appellant	)	Appealed from
No. 6-87-085-CR	v.	) County Court No. 1
The State of Texas .....Appellee	)	Galveston County, Texas

PER CURIAM

John Edward Harris was convicted of criminal trespass. Tex. Penal Code Ann. § 30.05 (Vernon Supp. 1988). On appeal, he urges that the conviction should be reversed because the application of the criminal trespass statute to his activities on the occasion in question violates his rights of free speech under the First Amendment to the United States Constitution and Article I, § 8 of the Texas Constitution. He also complains of numerous trial errors.

FACTS

Harris and several other persons were distributing anti-abortion booklets to high school students as the students got off school buses to go to morning classes at Friendswood High School. Harris was standing on a sidewalk inside the school campus at a bus unloading point about twenty feet from the two main entrances to the school. Wilson Elliott, the school administrator on duty, testified that he asked the group if they had permission to

distribute the booklets and was told that permission was unnecessary because they were on a public sidewalk. Elliott told them that if they did not have permission they would have to leave, because the sidewalk was on school property and it was a violation of school policy to allow anyone to distribute literature on the school campus. The leader of the group gave Elliott a lawyer's opinion letter which stated that the group had a right to distribute booklets on a public sidewalk. Elliott then contacted his superiors and the school's retained law firm. After doing so, he informed the leader of the group that the sidewalk was private property and asked them to leave. They refused and Elliott threatened to call the police. When they still refused, Elliott called the police. When the police arrived, they explained the law of criminal trespass to them and asked them to leave. When they again refused, they were arrested and charged with violating Tex. Penal Code Ann. § 30.05, which provides in part as follows:

> (a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
>
> . . .
>
> (2) received notice to depart but failed to do so.
>
> . . . .
>
> (c) An offense under this section is a Class B misdemeanor unless it is committed in a habitation or the actor carries a deadly weapon on or about his person during the commission of the offense, in which event it is a Class A misdemeanor.

CONSTITUTIONAL QUESTION

The constitutional question is whether Harris' conviction of criminal trespass under the facts stated amounts to an impermissible restriction on his rights of free expression guaranteed by the United States and Texas Constitutions. U.S. Const. amend. I; Tex. Const. art. I, § 8.

General principles pertaining to the federal guarantee of free speech on public property are well established. The Constitution does not guarantee that those who want to propagandize their views may do so wherever and however they please. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471 (2d Cir. 1976). Nor does the Constitution require the government to freely permit access to all its property to those who wish to exercise their rights of free speech. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Adderley v. Florida*, supra. The extent to which the government can control access to its property for expressive purposes depends on the nature of the forums, which have been divided into three categories. *Public forums* are those areas which traditionally have been devoted to assembly and public debate, such as public streets, sidewalks, and parks. *Limited public forums* are those forums which the government has voluntarily opened for use by the public or certain speakers for expressive activity. *Nonpublic*

forums are those which neither by tradition nor government action have become forums for public communication. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

Speech may not be suppressed in public forums unless it is necessary to achieve a compelling governmental interest. When permitted, regulations restricting speech may only consist of reasonable time, place and manner regulations which are content neutral, are narrowly drawn to achieve the compelling governmental interest, and which leave open ample alternative channels for expression. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra. In limited public forums, speech is protected to the same extent as in traditional public forms, as long as the forums remain open, but access may be restricted to entities similar to those which have previously been allowed access. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra. In nonpublic forums, speech may be restricted so long as the regulations are reasonable and do not attempt to suppress expression because of public officials' opposition to the speaker's views. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra.

Texas constitutional provisions guaranteeing freedom of expression are coextensive with the federal guarantees, and we will apply the same analysis and principles of construction in interpreting them.

The record in this case indisputably establishes that Harris' activities were conducted in a nonpublic forum. The place is not an area which by tradition has been devoted to public assembly or debate by the general public. It is entirely on school grounds, and there is no evidence that it had ever been opened by the school authorities as a place for public expressive activity. A limited public forum cannot be created by inaction, or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. *Cornelius v. NAACP Legal Defense & Education Fund,* supra; *United States v. Albertini,* 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.,* supra; *Texas State Teachers Association v. Garland Independent School District,* 777 F.2d 1046 (5th Cir. 1985). Nor is an area converted into a limited public forum simply because members of the public are permitted to come and go at will. *Grattan v. Board of School Commissioners of Baltimore City,* 805 F.2d 1160 (4th Cir. 1986).

Public school facilities and grounds have consistently been held to be nonpublic forums, unless there has been an intentional opening of them to expressive activity. *Perry Education Assn. v. Perry Local Educators' Assn.,* supra; *Grattan v. Board of School Commissioners of Baltimore City,* supra; *Texas State Teachers Association v. Garland Independent School District,* supra; *Connecticut State Federation of Teachers v. Board of Education Members,* supra; *compare: Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The area involved in this case is clearly not a public forum, either traditional or limited.

Moreover, the statute applied in this case does not regulate speech. It regulates conduct. A general trespass statute may be constitutionally applied, even to those who trespass in order to communicate, so long as it is applied without discrimination and is not used for the primary purpose of suppressing speech. *United States v. Albertini*, supra; *Adderley v. Florida*, supra; *Hoffart v. State*, 686 S.W.2d 259 (Tex. App.-Houston [14th Dist.] 1985, no writ); *Rains v. Mercantile National Bank at Dallas*, 599 S.W.2d 121 (Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e.); Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L.Rev. 1713 (1987). There is no evidence that Harris and his companions were required to leave the premises or discontinue their activities because of the content of the booklets they were distributing. There is no evidence that the school authorities objected to or disagreed with Harris' views as expressed in the booklets. Indeed, there is evidence that the school officials would have allowed the pamphlets to be left at various places in the school where they could be picked up by the students if they desired.

The enforcement of the criminal trespass statute in this instance did not violate Harris' rights of expression under either the United States or the Texas Constitutions.

PRETRIAL AND TRIAL ERRORS

Harris contends that because the charging information stated only that the offense was committed on the property of Wilson Elliott it gave insufficient notice of the property's location as required by Tex. Code Crim. Proc. Ann. art. 21.09 (Vernon Supp. 1988). That statute requires

the charging instrument to specify the general locality of real estate involved in the offense. The courts have ruled, however, that unless the property is the *object* of the offense rather than the *situs*, merely naming the county where the property is located is sufficient if (1) the offense may be committed anywhere in the county, (2) the place where it is committed is not an element of the offense, and (3) the court in which the offense is tried has countywide jurisdiction. *Santana v. State*, 658 S.W.2d 612 (Tex. Crim. App. 1983); *Hodge v. State*, 527 S.W.2d 289 (Tex. Crim. App. 1975). Trespass is an offense against the owner's possession and control of property, rather than an offense *against the property itself*, as is the case of an offense such as arson. *See Franks v. State*, 688 S.W.2d 502 (Tex. Crim. App. 1985); *Lane v. State*, 621 S.W.2d 172 (Tex. Crim. App. [Panel Op.] 1981). The location of the property is not an element of the offense. Tex. Penal Code Ann. § 30.05. Thus, the allegation that the crime occurred in Galveston County is sufficient to meet the notice requirements.

Even if the exact location was necessary for adequate notice, its omission is not reversible error unless it had an impact on Harris' ability to prepare a defense. *Adams v. State*, 707 S.W.2d 900 (Tex. Crim. App. 1986); Tex. Code Crim. Proc. Ann. art. 21.19 (Vernon 1966). Here, Harris' motion for joint trial and original motion to quash the information both specified the location of the trespass. As Harris was well aware of the location, the defect could not have prejudiced him in his defense.

Harris now contends that the information should also have been quashed because it failed to allege sufficient

facts to bar a subsequent conviction. He raises this argument for the first time on appeal. A contention of that kind must be raised prior to trial and may not be raised for the first time on appeal. *American Plant Food Corporation v. State,* 508 S.W.2d 598 (Tex. Crim. App. 1974); *Terry v. State,* 471 S.W.2d 848 (Tex. Crim. App. 1971).

Harris further contends that the first amended information did not allege an element of the offense: that he "received" notice to vacate the premises. In pertinent part the information alleges that Harris refused to leave after "the said Wilson Elliott had by oral communication told the said John Edward Harris to depart." Although the information does not use the words of the statute, it does use other words conveying the same meaning. The information alleges that he remained after he was told to leave. This is sufficient to convey the sense of the statutory language. Tex. Code Crim. Proc. Ann. art. 21.17. Thus, this contention has no merit.

Harris also contends that the court committed reversible error in failing to allow him an evidentiary hearing on his motions to quash the information.

As far as the motions attacked defects in the information, no evidentiary hearing was necessary or proper. In judging the merits of such an attack, the court must consider only the face of the instrument. *Barnhart v. State,* 648 S.W.2d 696 (Tex. Crim. App. 1983). Evidentiary hearings on other pretrial contentions are discretionary, not mandatory. Tex. Code Crim. Proc. Ann. art. 28.01, § 1(4) (Vernon Supp. 1988). We cannot agree with Harris' argument that he should have had an evidentiary hearing on the constitutional questions raised in his motions to

quash. Those contentions went to the very merits of the case – not to pretrial matters – and Harris was given a full hearing on those matters at trial. We perceive no error in this regard.

Harris next alleges error because the trial court allowed school officials to testify that, had permission been asked, they would have allowed Harris' pamphlets to be placed at strategic places in the school and made available to the students who desired to see them.

We find no error in the admission of this evidence. It was relevant to show that school officials were not suppressing Harris' material because of its content, or suppressing it at all, but that they were simply attempting to enforce the trespass statute to maintain a type of environment they believed was compatible with the institution's goals and purposes. Additionally, the same evidence had previously been admitted without objection, so Harris cannot complain of its subsequent admission.

Harris also complains of inflammatory remarks by State's counsel during final argument. Harris' counsel objected to the comments, and the objection was sustained. He did not request an instruction for the jury to disregard or move for a mistrial. When an objection is sustained and no further relief is requested, a defendant has received all the relief requested and no error is preserved. *Darty v. State*, 709 S.W.2d 652 (Tex. Crim. App. 1986); *Nethery v. State*, 692 S.W.2d 686 (Tex. Crim. App. 1985).

Error is claimed because the prosecutor commented that school guidelines had been prepared for situations

such as "these criminal trespassers." When defense counsel objected, the prosecutor replied that this was simply the allegation of the information, and then in response to the court's instruction he rephrased the question. Defense counsel did not obtain a ruling on his objection and did not request an instruction or a mistrial. Absent an adverse ruling, no error is preserved for review.

Harris also argues that the trial court erred in refusing two jury instructions he requested. The lengthy instructions, one for federal law and one for Texas law, essentially told the jury that if Harris was peacefully distributing literature on school property before classes began and his activities were not disruptive, they should acquit him.

The court properly refused the instructions because they were legally incorrect. As noted earlier, the facts stated in the requested instructions do not render the enforcement of the trespass statute unconstitutional. Since the essential facts as to Harris' conduct are undisputed, the question whether the trespass statute is unconstitutional as applied to Harris is a question of law, and the instructions could have served no proper purpose. *Hoffart v. State,* supra.

Harris also contends that the evidence is insufficient to support the conviction. The thrust of his argument under this point is that he had no criminal intent, but thought he was lawfully entitled to do what he was doing.

The evidence is undisputed that Harris violated the criminal trespass statute by remaining on school property after being requested to leave. No culpable mental state is

required for a conviction under this statute, other than a volitional refusal to leave when requested. We have already concluded that Harris did not have a constitutional right to engage in the activities, so the evidence is sufficient to support the conviction.

Finally, Harris argues that the court should have granted his motion in arrest of judgment. The bases of this point are the same as those we have covered and rejected in other points.

For the reasons stated, the judgment of the trial court is affirmed.

November 8, 1988
Filed November 8, 1988

Do Not Publish

OPINION OF THE COURT OF APPEALS
(Murphy v. Texas)
(November 8, 1988)

Court of Appeals
Sixth District
Texarkana, Texas

Patricia Fay Murphy . .Appellant) Appealed from
No. 6-87-084-CR v.) County Court No. 1
The State of Texas . . . . .Appellee) Galveston County, Texas

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PER CURIAM

Patricia Fay Murphy was convicted of criminal trespass. Tex. Penal Code Ann. § 30.05 (Vernon Supp. 1988). On appeal, she urges that the conviction should be reversed because the application of the criminal trespass statute to her activities on the occasion in question violates her rights of free speech under the First Amendment to the United States Constitution and Article I, § 8 of the Texas Constitution. She also complains of numerous trial errors. We overrule all these contentions and affirm the judgment.

FACTS

Murphy and several other persons were distributing anti-abortion booklets to high school students as the students got off school buses to go to morning classes at Friendswood High School. Murphy was standing on a sidewalk inside the school campus at a bus unloading point about twenty feet from the two main entrances to the school. Wilson Elliott, the school administrator on

duty, testified that he asked the group if they had permission to distribute the booklets and was told that permission was unnecessary because they were on a public sidewalk. Elliott told them that if they did not have permission they would have to leave, because the sidewalk was on school property and it was a violation of school policy to allow anyone to distribute literature on the school campus. The leader of the group gave Elliott a lawyer's opinion letter which stated that the group had a right to distribute booklets on a public sidewalk. Elliott then contacted his superiors and the school's retained law firm. After doing so, he informed the leader of the group that the sidewalk was private property and asked them to leave. They refused and Elliott threatened to call the police. When they still refused, Elliott called the police. When the police arrived, they explained the law of criminal trespass to them and asked them to leave. When they again refused, they were arrested and charged with violating Tex. Penal Code Ann. § 30.05, which provides in part as follows:

> (a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
>
> . . .
>
> (2) received notice to depart but failed to do so.
>
> . . . .
>
> (c) An offense under this section is a Class B misdemeanor unless it is committed in a habitation or the actor carries a deadly weapon on or about his person during the commission of the offense, in which event it is a Class A misdemeanor.

CONSTITUTIONAL QUESTION

The constitutional question is whether Murphy's conviction of criminal trespass under the facts stated amounts to an impermissible restriction on her rights of free expression guaranteed by the United States and Texas Constitutions. U. S. Const. amend. I; Tex. Const. art. I, § 8.

General principles pertaining to the federal guarantee of free speech on public property are well established. The Constitution does not guarantee that those who want to propagandize their views may do so wherever and however they please. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471 (2d Cir. 1976). Nor does the Constitution require the government to freely permit access to all its property to those who wish to exercise their rights of free speech. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Adderley v. Florida*, supra. The extent to which the government can control access to its property for expressive purposes depends on the nature of the forums, which have been divided into three categories. *Public forums* are those areas which traditionally have been devoted to assembly and public debate, such as public streets, sidewalks, and parks. *Limited public forums* are those forums which the government has voluntarily opened for use by the public or certain speakers for expressive activity. *Nonpublic*

forums are those which neither by tradition nor government action have become forums for public communication. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

Speech may not be suppressed in public forums unless it is necessary to achieve a compelling governmental interest. When permitted, regulations restricting speech may only consist of reasonable time, place and manner regulations which are content neutral, are narrowly drawn to achieve the compelling governmental interest, and which leave open ample alternative channels for expression. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra. In limited public forums, speech is protected to the same extent as in traditional public forums, as long as the forums remain open, but access may be restricted to entities similar to those which have previously been allowed access. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra. In nonpublic forums, speech may be restricted so long as the regulations are reasonable and do not attempt to suppress expression because of public officials' opposition to the speaker's views. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra.

Texas constitutional provisions guaranteeing freedom of expression are coextensive with the federal guarantees, and we will apply the same analysis and principles of construction in interpreting them.

The record in this case indisputably establishes that Murphy's activities were conducted in a nonpublic forum. The place is not an area which by tradition has been devoted to public assembly or debate by the general public. It is entirely on school grounds, and there is no evidence that it had ever been opened by school authorities as a place for public expressive activity. A limited public forum cannot be created by inaction, or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.*, supra; *Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046 (5th Cir. 1985). Nor is an area converted into a limited public forum simply because members of the public are permitted to come and go at will. *Grattan v. Board of School Commissioners of Baltimore City*, 805 F.2d 1160 (4th Cir. 1986).

Public school facilities and grounds have consistently been held to be nonpublic forums, unless there has been an intentional opening of them to expressive activity. *Perry Education Assn. v. Perry Local Educators' Assn.*, supra; *Grattan v. Board of School Commissioners of Baltimore City*, supra; *Texas State Teachers Association v. Garland Independent School District*, supra; *Connecticut State Federation of Teachers v. Board of Education Members*, supra; *compare: Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The area involved in this case is clearly not a public forum, either traditional or limited.

Moreover, the statute applied in this case does not regulate speech. It regulates conduct. A general trespass statute may be constitutionally applied, even to those who trespass in order to communicate, so long as it is applied without discrimination and is not used for the primary purpose of suppressing speech. *United States v. Albertini*, supra; *Adderley v. Florida*, supra; *Hoffart v. State*, 686 S.W.2d 259 (Tex. App.-Houston [14th Dist.] 1985, no writ); *Rains v. Mercantile National Bank at Dallas*, 599 S.W.2d 121 (Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e.); Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L.Rev. 1713 (1987). There is no evidence that Murphy and her companions were required to leave the premises or discontinue their activities because of the content of the booklets they were distributing. There is no evidence that the school authorities objected to or disagreed with Murphy's views as expressed in the booklets. Indeed, there is evidence that the school officials would have allowed the pamphlets to be left at various places in the school where they could be picked up by the students if they desired.

The enforcement of the criminal trespass statute in this instance did not violate Murphy's rights of expression under either the United States or the Texas Constitutions.

PRETRIAL AND TRIAL ERRORS

Murphy contends that because the charging information stated only that the offense was committed on the property of Wilson Elliott, it gave insufficient notice of the property's location as required by Tex. Code Crim.

Proc. Ann. art. 21.09 (Vernon Supp. 1988). That statute requires the charging instrument to specify the general locality of real estate involved in the offense. The courts have ruled, however, that unless the property is the *object* of the offense rather than the *situs*, merely naming the county where the property is located is sufficient if (1) the offense may be committed anywhere in the county, (2) the place where it is committed is not an element of the offense, and (3) the court in which the offense is tried has countywide jurisdiction. *Santana v. State*, 658 S.W.2d 612 (Tex. Crim. App. 1983); *Hodge v. State*, 527 S.W.2d 289 (Tex. Crim. App. 1975). Trespass is an offense against the owner's possession and control of property, rather than an offense *against the property itself*, as is the case of an offense such as arson. *See Franks v. State*, 688 S.W.2d 502 (Tex. Crim. App. 1985); *Lane v. State*, 621 S.W.2d 172 (Tex. Crim. App. [Panel Op.] 1981). The location of the property is not an element of the offense. Tex. Penal Code Ann. § 30.05. Thus, the allegation that the crime occurred in Galveston County is sufficient to meet the notice requirements.

Even if the exact location was necessary for adequate notice, its omission is not reversible error unless it had an impact on Murphy's ability to prepare a defense. *Adams v. State*, 707 S.W.2d 900 (Tex. Crim. App. 1986); Tex. Code Crim. Proc. Ann. art. 21.19 (Vernon 1966). Here, Murphy's motion for joint trial and original motion to quash the information both specified the location of the trespass. As Murphy was well aware of the location, the defect could not have prejudiced her in her defense.

Murphy now contends that the information should also have been quashed because it failed to allege

sufficient facts to bar a subsequent conviction. She raises this argument for the first time on appeal. A contention of that kind must be raised prior to trial and may not be raised for the first time on appeal. *American Plant Food Corporation v. State,* 508 S.W.2d 598 (Tex. Crim. App. 1974); *Terry v. State,* 471 S.W.2d 848 (Tex. Crim. App. 1971).

Murphy also contends that the court reversibly erred in failing to allow her an evidentiary hearing on her motions to quash the information.

As far as the motions attacked defects in the information, no evidentiary hearing was necessary or proper. In judging the merits of such an attack, the court must consider only the face of the instrument. *Barnhart v. State,* 648 S.W.2d 696 (Tex. Crim. App. 1983). Evidentiary hearings on other pretrial contentions are discretionary, not mandatory. Tex. Code Crim. Proc. Ann. art. 28.01, § 1(4) (Vernon Supp. 1988). We cannot agree with Murphy's argument that she should have had an evidentiary hearing on the constitutional questions raised in her motions to quash. Those contentions went to the very merits of the case – not to pretrial matters – and Murphy was given a full hearing on those matters at trial. We perceive no error in this regard.

Murphy next alleges error because the trial court allowed school officials to testify that, had permission been asked, they would have allowed Murphy's pamphlets to be placed at strategic places in the school and made available to the students who desired to see them.

We find no error in the admission of this evidence. It was relevant to show that school officials were not suppressing Murphy's material because of its content, or suppressing it at all, but that they were simply attempting to enforce the trespass statute to maintain a type of environment they believed was compatible with the institution's goals and purposes. Additionally, the same evidence had previously been admitted without objection, so Murphy cannot complain of its subsequent admission.

Murphy also complains of inflammatory remarks by State's counsel during final argument. Murphy's counsel objected to the comments, and the objection was sustained. She did not request an instruction for the jury to disregard or move for a mistrial. When an objection is sustained and no further relief is requested, a defendant has received all the relief requested and no error is preserved. *Darty v. State*, 709 S.W.2d 652 (Tex. Crim. App. 1986); *Nethery v. State*, 692 S.W.2d 686 (Tex. Crim. App. 1985).

Error is claimed because the prosecutor commented that school guidelines had been prepared for situations such as "these criminal trespassers." When defense counsel objected, the prosecutor replied that this was simply the allegation of the information, and then in response to the court's instruction he rephrased the question. Defense counsel did not obtain a ruling on his objection and did not request an instruction or a mistrial. Absent an adverse ruling, no error is preserved for review.

Murphy also argues that the trial court erred in refusing two jury instructions she requested. The lengthy

instructions, one for federal law and one for Texas law, essentially told the jury that if Murphy was peacefully distributing literature on school property before classes began and her activities were not disruptive, they should acquit her.

The court properly refused the instructions because they were legally incorrect. As noted earlier, the facts stated in the requested instructions do not render the enforcement of the trespass statute unconstitutional. Since the essential facts as to Murphy's conduct are undisputed, the question whether the trespass statute is unconstitutional as applied to Murphy is a question of law, and the instructions could have served no proper purpose. *Hoffart v. State*, supra.

Murphy also contends that the evidence is insufficient to support the conviction. The thrust of her argument under this point is that she had no criminal intent, but thought she was lawfully entitled to do what she was doing.

The evidence is undisputed that Murphy violated the criminal trespass statute by remaining on school property after being requested to leave. No culpable mental state is required for a conviction under this statute, other than a volitional refusal to leave when requested. We have already concluded that Murphy did not have a constitutional right to engage in the activities, so the evidence is sufficient to support the conviction.

Finally, Murphy argues that the court should have granted her motion in arrest of judgment. The bases of this point are the same as those we have covered and rejected in other points.

For the reasons stated, the judgment of the trial court is affirmed.

November 8, 1988
Filed November 8, 1988

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OPINION OF THE COURT OF APPEALS
(Reed v. Texas)
(November 8, 1988)

Court of Appeals
Sixth District
Texarkana, Texas

Charles Dale Reed . . Appellant	)	Appealed from
No. 6-87-086-CR v.	)	County Court No. 1
The State of Texas . . . Appellee	)	Galveston County, Texas

Charles Dale Reed was convicted of criminal trespass. Tex. Penal Code Ann. § 30.05 (Vernon Supp. 1988). On appeal, he urges that the conviction should be reversed because the application of the criminal trespass statute to his activities on the occasion in question violates his rights of free speech under the First Amendment to the United States Constitution and Article I, § 8 of the Texas Constitution. He also complains of numerous trial errors. We overrule all these contentions and affirm the judgment.

FACTS

Reed and several other persons were distributing anti-abortion booklets to high school students as the students got off school buses to go to morning classes at Friendswood High School. Reed was standing on a sidewalk inside the school campus at a bus unloading point about twenty feet from the two main entrances to the school. Wilson Elliott, the school administrator on duty, testified that he asked the group if they had permission to distribute the booklets and was told that permission was

unnecessary because they were on a public sidewalk. Elliott told them that if they did not have permission they would have to leave, because the sidewalk was on school property and it was a violation of school policy to allow anyone to distribute literature on the school campus. The leader of the group gave Elliott a lawyer's opinion letter which stated that the group had a right to distribute booklets on a public sidewalk. Elliott then contacted his superiors and the school's retained law firm. After doing so, he informed the leader of the group that the sidewalk was private property and asked them to leave. They refused and Elliott threatened to call the police. When they still refused, Elliott called the police. When the police arrived, they explained the law of criminal trespass to them and asked them to leave. When they again refused, they were arrested and charged with violating Tex. Penal Code Ann. § 30.05, which provides in part as follows:

> (a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
>
> . . .
>
> (2) received notice to depart but failed to do so.
>
> . . . .
>
> (c) An offense under this section is a Class B misdemeanor unless it is committed in a habitation or the actor carries a deadly weapon on or about his person during the commission of the offense, in which event it is a Class A misdemeanor.

CONSTITUTIONAL QUESTION

The constitutional question is whether Reed's conviction of criminal trespass under the facts stated amounts to an impermissible restriction on his rights of free expression guaranteed by the United States and Texas Constitutions. U. S. Const. amend. I; Tex. Const. art. I, § 8.

General principles pertaining to the federal guarantee of free speech on public property are well established. The Constitution does not guarantee that those who want to propagandize their views may do so wherever and however they please. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471 (2d Cir. 1976). Nor does the Constitution require the government to freely permit access to all its property to those who wish to exercise their rights of free speech. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Adderley v. Florida*, supra. The extent to which the government can control access to its property for expressive purposes depends on the nature of the forums, which have been divided into three categories. *Public forums* are those areas which traditionally have been devoted to assembly and public debate, such as public streets, sidewalks, and parks. *Limited public forums* are those forums which the government has voluntarily opened for use by the public or certain speakers for expressive activity. *Nonpublic forums* are those which neither by tradition nor government action have become forums for public communication. *Cornelius v. NAACP Legal Defense & Education Fund*,

supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

Speech may not be suppressed in public forums unless it is necessary to achieve a compelling governmental interest. When permitted, regulations restricting speech may only consist of reasonable time, place and manner regulations which are content neutral, are narrowly drawn to achieve the compelling governmental interest, and which leave open ample alternative channels for expression. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra. In limited public forums, speech is protected to the same extent as in traditional public forums, as long as the forums remain open, but access may be restricted to entities similar to those which have previously been allowed access. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra. In nonpublic forums, speech may be restricted so long as the regulations are reasonable and do not attempt to suppress expression because of public officials' opposition to the speaker's views. *Cornelius v. NAACP Legal Defense & Education Fund*, supra; *Perry Education Assn. v. Perry Local Educators' Assn.*, supra.

Texas constitutional provisions guaranteeing freedom of expression are coextensive with the federal guarantees, and we will apply the same analysis and principles of construction in interpreting them.

The record in this case indisputably establishes that Reed's activities were conducted in a nonpublic forum. The place is not an area which by tradition has been

devoted to public assembly or debate by the general public. It is entirely on school grounds, and there is no evidence that it had ever been opened by school authorities as a place for public expressive activity. A limited public forum cannot be created by inaction, or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. *Cornelius v. NAACP Legal Defense & Education Fund,* supra; *United States v. Albertini,* 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.,* supra; *Texas State Teachers Association v. Garland Independent School District,* 777 F.2d 1046 (5th Cir. 1985). Nor is an area converted into a limited public forum simply because members of the public are permitted to come and go at will. *Grattan v. Board of School Commissioners of Baltimore City,* 805 F.2d 1160 (4th Cir. 1986).

Public school facilities and grounds have consistently been held to be nonpublic forums, unless there has been an intentional opening of them to expressive activity. *Perry Education Assn. v. Perry Local Educators' Assn.,* supra; *Grattan v. Board of School Commissioners of Baltimore City,* supra; *Texas State Teachers Association v. Garland Independent School District,* supra; *Connecticut State Federation of Teachers v. Board of Education Members,* supra; *compare: Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The area involved in this case is clearly not a public forum, either traditional or limited.

Moreover, the statute applied in this case does not regulate speech. It regulates conduct. A general trespass statute may be constitutionally applied, even to those

who trespass in order to communicate, so long as it is applied without discrimination and is not used for the primary purpose of suppressing speech. *United States v. Albertini*, supra; *Adderley v. Florida*, supra; *Hoffart v. State*, 686 S.W.2d 259 (Tex. App.-Houston [14th Dist.] 1985, no writ); *Rains v. Mercantile National Bank at Dallas*, 599 S.W.2d 121 (Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e.); Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L.Rev. 1713 (1987). There is no evidence that Reed and his companions were required to leave the premises or discontinue their activities because of the content of the booklets they were distributing. There is no evidence that the school authorities objected to or disagreed with Reed's views as expressed in the booklets. Indeed, there is evidence that the school officials would have allowed the pamphlets to be left at various places in the school where they could be picked up by the students if they desired.

The enforcement of the criminal trespass statute in this instance did not violate Reed's rights of expression under either the United States or the Texas Constitutions.

PRETRIAL AND TRIAL ERRORS

Reed contends that because the charging information stated only that the offense was committed on the property of Wilson Elliott, it gave insufficient notice of the property's location as required by Tex. Code Crim. Proc. Ann. art. 21.09 (Vernon Supp. 1988). That statute requires the charging instrument to specify the general locality of real estate involved in the offense. The courts have ruled, however, that unless the property is the *object* of the

offense rather than the *situs*, merely naming the county where the property is located is sufficient if (1) the offense may be committed anywhere in the county, (2) the place where it is committed is not an element of the offense, and (3) the court in which the offense is tried has countywide jurisdiction. *Santana v. State*, 658 S.W.2d 612 (Tex. Crim. App. 1983); *Hodge v. State*, 527 S.W.2d 289 (Tex. Crim. App. 1975). Trespass is an offense against the owner's possession and control of property, rather than an offense *against the property itself*, as is the case of an offense such as arson. *See Franks v. State*, 688 S.W.2d 502 (Tex. Crim. App. 1985); *Lane v. State*, 621 S.W.2d 172 (Tex. Crim. App. [Panel Op.] 1981). The location of the property is not an element of the offense. Tex. Penal Code Ann. § 30.05. Thus, the allegation that the crime occurred in Galveston County is sufficient to meet the notice requirements.

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Reed now contends that the information should also have been quashed because it failed to allege sufficient facts to bar a subsequent conviction. He raises this argument for the first time on appeal. A contention of that kind must be raised prior to trial and may not be raised

for the first time on appeal. *American Plant Food Corporation v. State*, 508 S.W.2d 598 (Tex. Crim. App. 1974); *Terry v. State*, 471 S.W.2d 848 (Tex. Crim. App. 1971).

Reed also contends that the court reversibly erred in failing to allow him an evidentiary hearing on his motions to quash the information.

As far as the motions attacked defects in the information, no evidentiary hearing was necessary or proper. In judging the merits of such an attack, the court must consider only the face of the instrument. *Barnhart v. State*, 648 S.W.2d 696 (Tex. Crim. App. 1983). Evidentiary hearings on other pretrial contentions are discretionary, not mandatory. Tex. Code Crim. Proc. Ann. art. 28.01, § 1(4) (Vernon Supp. 1988). We cannot agree with Reed's argument that he should have had an evidentiary hearing on the constitutional questions raised in his motions to quash. Those contentions went to the very merits of the case – not to pretrial matters – and Reed was given a full hearing on those matters at trial. We perceive no error in this regard.

Reed next alleges error because the trial court allowed school officials to testify that, had permission been asked, they would have allowed Reed's pamphlets to be placed at strategic places in the school and made available to the students who desired to see them.

We find no error in the admission of this evidence. It was relevant to show that school officials were not suppressing Reed's material because of its content, or suppressing it at all, but that they were simply attempting to enforce the trespass statute to maintain a type of

environment they believed was compatible with the institution's goals and purposes. Additionally, the same evidence had previously been admitted without objection, so Reed cannot complain of its subsequent admission.

Reed also complains of inflammatory remarks by State's counsel during final argument. Reed's counsel objected to the comments, and the objection was sustained. He did not request an instruction for the jury to disregard or move for a mistrial. When an objection is sustained and no further relief is requested, a defendant has received all the relief requested and no error is preserved. *Darty v. State*, 709 S.W.2d 652 (Tex. Crim. App. 1986); *Nethery v. State*, 692 S.W.2d 686 (Tex. Crim. App. 1985).

Error is claimed because the prosecutor commented that school guidelines had been prepared for situations such as "these criminal trespassers." When defense counsel objected, the prosecutor replied that this was simply the allegation of the information, and then in response to the court's instruction he rephrased the question. Defense counsel did not obtain a ruling on his objection and did not request an instruction or a mistrial. Absent an adverse ruling, no error is preserved for review.

Reed also argues that the trial court erred in refusing two jury instructions he requested. The lengthy instructions, one for federal law and one for Texas law, essentially told the jury that if Reed was peacefully distributing literature on school property before classes began and his activities were not disruptive, they should acquit him.

The court properly refused the instructions because they were legally incorrect. As noted earlier, the facts stated in the requested instructions do not render the enforcement of the trespass statute unconstitutional. Since the essential facts as to Reed's conduct are undisputed, the question whether the trespass statute is unconstitutional as applied to Reed is a question of law, and the instructions could have served no proper purpose. *Hoffart v. State,* supra.

Reed also contends that the evidence is insufficient to support the conviction. The thrust of his argument under this point is that he had no criminal intent, but thought he was lawfully entitled to do what he was doing.

The evidence is undisputed that Reed violated the criminal trespass statute by remaining on school property after being requested to leave. No culpable mental state is required for a conviction under this statute, other than a volitional refusal to leave when requested. We have already concluded that Reed did not have a constitutional right to engage in the activities, so the evidence is sufficient to support the conviction.

Finally, Reed argues that the court should have granted his motion in arrest of judgment. The bases of this point are the same as those we have covered and rejected in other points.

For the reasons stated, the judgment of the trial court is affirmed.

/s/ William J. Cornelius
William J. Cornelius
Chief Justice

November 8, 1988
Filed November 8, 1988

Publish

JUDGMENT OF THE COURT OF APPEALS
(Harris v. Texas)
(November 8, 1988)

JUDGMENT

BE IT REMEMBERED that on Tuesday the 8th day of November, A.D. 1988, the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, Charles Bleil, Justice, Ben Z. Grant, Justice, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others, were had, to-wit:

John Edward Harris. . .Appellant	)	Appealed from
No. 6-87-085-CR v.	)	County Court No. 1
The State of Texas . . . . .Appellee	)	Galveston County, Texas

THIS CAUSE came on to be considered on the transcript of the record, the statement of facts, and upon the briefs and oral argument of both parties; and the Court, after considering the same, is of the opinion and finds there was no error in the judgment of the court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court be, and hereby is, in all things AFFIRMED, in conformity with the written opinion of this Court of even date on file herein; that appellant John Edward Harris, shall pay all costs expended in behalf of this appeal; and that this judgment be certified to the Court below for observance.

JUDGMENT OF THE COURT OF APPEALS
(Murphy v. Texas)
(November 8, 1988)

JUDGMENT

BE IT REMEMBERED that on Tuesday the 8th day of November, A.D. 1988, the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, Charles Bleil, Justice, Ben Z. Grant, Justice, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others, were had, to-wit:

Patricia Fay Murphy . . Appellant	)	Appealed from
No. 6-87-084-CR v.	)	County Court No. 1
The State of Texas . . . . . Appellee	)	Galveston County, Texas

THIS CAUSE came on to be considered on the transcript of the record, the statement of facts, and upon the briefs and oral argument of both parties; and the Court, after considering the same, is of the opinion and finds there was no error in the judgment of the court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court be, and hereby is, in all things AFFIRMED, in conformity with the written opinion of this Court of even date on file herein; that appellant Patricia Fay Murphy, shall pay all costs expended in behalf of this appeal; and that this judgment be certified to the Court below for observance.

JUDGMENT OF THE COURT OF APPEALS
(Reed v. Texas)
(November 8, 1988)

JUDGMENT

BE IT REMEMBERED that on Tuesday the 8th day of November, A.D. 1988, the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, Charles Bleil, Justice, Ben Z. Grant, Justice, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others, were had, to-wit:

Charles Dale Reed . .Appellant)		Appealed from
No. 6-87-086-CR	v.	) County Court No. 1
The State of Texas . . .Appellee)		Galveston County, Texas

This cause came on to be considered on the transcript of the record, the statement of facts, and upon the briefs and oral argument of both parties; and the Court, after considering the same, is of the opinion and finds there was no error in the judgment of the Court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court be, and hereby is, in all things AFFIRMED, in conformity with the written opinion of this Court of even date on file herein; that appellant Charles Dale Reed, shall pay all costs expended in behalf of this appeal; and that this judgment be certified to the Court below for observance.

NOTIFICATION OF ORDERS OF THE COURT OF APPEALS OVERRULING MOTIONS FOR REHEARING
(November 29, 1988)

Court of Appeals
Sixth Supreme Judicial District of Texas
Bi-State Justice Building
100 North State Line Avenue
Texarkana, Texas 75501
Louise Waldrop Lohse, Clerk Telephone (214) 798-3046

November 29, 1988

Hon. Richard W. Schmude
Attorney at Law
P. O. Box 674
Tomball, TX 77375

Hon. Michael J. Guarino
Criminal District Attorney
405 County Courthouse
Galveston, TX 77550

RE: CASE NO. 06-87-00085-CR

STYLE: Harris, John Edward
V: Texas, The State of

The Court entered its order this date in the referenced proceeding whereby Appellant's Motion for Rehearing was OVERRULED.

PLEASE TAKE DUE NOTICE HEREOF.

Respectfully yours,

Louise Waldrop Lohse, Clerk

By /s/ Tibby Thomas
Deputy

Court of Appeals
Sixth Supreme Judicial District of Texas
Bi-State Justice Building
100 North State Line Avenue
Texarkana, Texas 75501
Louise Waldrop Lohse, Clerk Telephone (214) 798-3046

November 29, 1988

Hon. Richard W. Schmude
Attorney at Law
P. O. Box 674
Tomball, TX 77375

Hon. Michael J. Guarino
Criminal District Attorney
405 County Courthouse
Galveston, TX 77550

RE: CASE NO. 06-87-00084-CR

STYLE: Murphy, Patricia Fay
V: Texas, The State of

The Court entered its order this date in the referenced proceeding whereby Appellant's Motion for Rehearing was OVERRULED.
PLEASE TAKE DUE NOTICE HEREOF.

Respectfully yours,

Louise Waldrop Lohse, Clerk

By /s/ Tibby Thomas
Deputy

Court of Appeals
Sixth Supreme Judicial District of Texas
Bi-State Justice Building
100 North State Line Avenue
Texarkana, Texas 75501
Louise Waldrop Lohse, Clerk Telephone (214) 798-3046

November 29, 1988

Hon. Richard W. Schmude
Attorney at Law
P. O. Box 674
Tomball, TX 77375

Hon. Michael J. Guarino
Criminal District Attorney
405 County Courthouse
Galveston, TX 77550

RE: CASE NO. 06-87-00086-CR

STYLE: Reed, Charles Dale
V: Texas, The State of

The Court entered its order this date in the referenced proceeding whereby Appellant's Motion for Rehearing was OVERRULED.
PLEASE TAKE DUE NOTICE HEREOF.

Respectfully yours,

Louise Waldrop Lohse, Clerk

By /s/ Tibby Thomas
Deputy

OFFICIAL NOTICES FROM THE COURT OF CRIMINAL APPEALS REFUSING PETITIONS FOR DISCRETIONARY REVIEW
(March 22, 1989) (Postmarks, etc. excluded.)

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

March 22, 1989
COA#: 06-87-00085-CR

RE: Case No. 0075-89
STYLE: Harris, John Edward

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

March 22, 1989
COA#: 06-87-00084-CR

RE: Case No. 0074-89
STYLE: Murphy, Patricia Fay

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

March 22, 1989
COA#: 06-87-00086-CR

RE: Case No. 0076-89
STYLE: Reed, Charles

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICES FROM THE COURT OF CRIMINAL APPEALS DENYING MOTIONS FOR REHEARING
(April 19, 1989) (Postmarks, etc. excluded.)

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 19, 1989
COA#: 06-87-00085-CR

RE: Case No. 0075-89
STYLE: Harris, John Edward

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 19, 1989
COA#: 06-87-00084-CR

RE: Case No. 0074-89
STYLE: Murphy, Patricia Fay

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 19, 1989
COA#: 06-87-00086-CR

RE: Case No. 0076-89
STYLE: Reed, Charles

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375